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Gong v Hong

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HIGH COURT (KUALA LUMPUR) — JOINT DIVORCE PETITION NO WA-33JP-168–02 OF 2021
EVROL MARIETTE PETERS J
24 NOVEMBER 2024

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Family Law — Divorce — Ancillary relief — Parties agreed in consent order on care, custody and control of children, visitation rights, spousal living arrangements and spousal and children's maintenance — Petitioner-wife ('PW') later applied to drastically vary several terms of consent order — Whether application had to be dismissed as PW had not proven any material change in circumstances to warrant variation — Whether parties had to strive to make consent order work and not seek intervention of Family Court whenever they had differences or disputes — Law Reform (Marriage and Divorce) Act 1976 ss 83, 84, 96 & 97

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The High Court granted a divorce on the joint petition of the husband ('H') and wife ('W') and recorded a consent order under which, inter alia: (a) custody, care and control of the three children of the marriage were given to H with full access, including staying access, to W at all times; (b) H was to pay W RM1,500 per month for her maintenance; (c) H and W were to each contribute RM2,500 per month to a joint bank account for the children's maintenance; (d) W was to have a room exclusively for her own use in the matrimonial home in which H and the children lived; and (e) all expenses connected with the matrimonial home and its acquisition were to be paid by H. Two years later, W filed the instant application pursuant to ss 83, 84, 96 and 97 of the Law Reform (Marriage and Divorce) Act 1976 for the consent order to be varied in the following manner: (i) that she be given sole guardianship of the children (the consent order never addressed the matter of guardianship); (ii) that she be given custody, care and control of the children with H to be granted visitation rights only; (iii) that H be directed to pay her RM5,000 per month for her maintenance and RM10,000 per month for the maintenance of the children, which latter amount was to be paid directly into her bank account; (iv) that H be ordered to either pay her a monthly allowance of RM2,500 to allow her to rent living quarters outside the matrimonial home or buy her a residential property equal in value to the matrimonial home; and (v) that H's earnings be attached at source.

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Held, dismissing the application:

(1) W had failed to comply with r 63 of the Divorce and Matrimonial Proceedings Rules 1980 which required her to affirm an affidavit setting

out full particulars of her property and income. Rule 63 was specifically relevant in the instant case as W was seeking to vary financial provisions for spousal and child maintenance in the consent order. W's failure to make disclosure under r 63 was fatal to her application (see paras 8, 10 & 13–14).

(2) W had failed to prove why it was necessary for custody, care and control of the children to be transferred to her. Her various allegations of H's incompetence, neglect or failings were not substantiated and were challenged by H. The evidence adduced, in fact, showed that H had made proactive efforts to meet his parental responsibilities. The home environment he provided for the children was supportive and nurturing, underscoring his active involvement in creating a stable and positive atmosphere conducive to the children's well-being. The evidence showed that H was actively involved in the children's lives and their growth (see paras 31–33 & 36–37).

(3) In the present case, guardianship was presumed to be the joint responsibility of both parents unless compelling reasons were presented to warrant otherwise. In matters of guardianship, the court had to prioritise the best interests of the children, taking into account factors such as stability, emotional well-being and the ability of each parent to provide care. Given the absence of convincing evidence to support a sole-guardian arrangement, there was no justification to deviate from the present joint guardianship structure (see paras 47–48).

(4) There was no justification to grant W's request for higher spousal maintenance, especially as she was employed and was able to contribute to her own financial stability. It was evident from the affidavits submitted that W was living beyond her means, incurring expenses that were not justifiable based on her financial resources. Her spending habits exceeded what her income and assets could reasonably support. There was also lack of financial transparency as W failed to disclose her income and assets in accordance with r 63 of the Divorce and Matrimonial Proceedings Rules 1980. This omission undermined the credibility of her application and rendered it procedurally flawed (see paras 50–52 & 57–59).

(5) No material change in circumstances was shown to justify altering the current child-maintenance arrangement. H had presented a detailed breakdown of his expenses and it showed that he was managing his financial responsibility prudently and in a manner that adequately provided for the well-being of the children (see paras 61–62).

(6) Although H conceded that he was experiencing difficulties living with W, he explicitly denied that he had expelled her from the matrimonial home. In fact, H was against W leaving the matrimonial home. It appeared,

therefore, that W wanted to leave the home on her own accord and not due to any pressure or coercion from H (see para 66).

(7) The police reports that W had annexed in her affidavit to support her allegation that H had made threats that caused her to fear for her safety and thereby made it impossible for her to remain in the matrimonial home carried limited probative value as they were merely self-serving statements that lacked independent verification. Without corroborating evidence from an impartial or third-party source, the allegations made in the police reports remained unsubstantiated. The police reports themselves did not provide sufficient basis to justify varying the consent order to impose a new obligation on H to provide separate living accommodation for W (see paras 67–70).

(8) There was no evidence to show that the current arrangements pertaining to the custody and maintenance of the children were unsatisfactory. W failed to prove that the terms of the current arrangement were unreasonable or detrimental to the children's welfare and deserved to be changed. On the other hand, H had demonstrated that the children were taken care of to the best of his ability in a stable and supportive environment (see paras 83–85).

(9) W's prayer for H's earnings to be attached was refused because it could not be made part of the present application. She had to file a separate application for that purpose. Rule 2 of the Divorce and Matrimonial Proceedings Rules did not include attachment of earnings within the definition of 'ancillary relief'. In any case, there was no basis or evidence adduced to support the prayer for H's earnings to be attached (see paras 90–91 & 94).

(10) Once parties had agreed to the terms of a consent order which was finalised, it should be respected and upheld unless there was material change in circumstances to justify a revision. The legal standard for varying an agreed court order was set high to prevent parties from revisiting terms which they found inconvenient or unappealing after the fact. The court could not reconsider terms that had been finalised just because personal disagreements had arisen between the parties. It was crucial for parties to rise above those disagreements and focus on their responsibilities, particularly in ensuring a stable and co-operative environment for the sake of their children (see paras 71–72 & 101).

[Bahasa Malaysia summary

Mahkamah Tinggi membenarkan permohonan petisyen perceraian bersama suami ('H') dan isteri ('W') dan merekodkan perintah persetujuan yang mana, antara lain: (a) hak tinggal bersama, jagaan dan kawalan terhadap ketiga-tiga anak hasil perkahwinan mereka diberikan kepada H dengan akses penuh, termasuk akses bermalam kepada W pada setiap masa; (b) H perlu membayar

W RM1,500 sebulan untuk nafkahnya; (c) H dan W masing-masing perlu memasukkan jumlah sebanyak RM2,500 sebulan ke dalam akaun bank bersama untuk nafkah anak-anak mereka; (d) W hendaklah mempunyai bilik yang hanya untuk kegunaannya sendiri di rumah suami isteri di mana H dan anak-anak tinggal; (e) semua perbelanjaan yang berkaitan dengan rumah suami isteri dan pengambilalihannya hendaklah dibayar oleh H. Dua tahun kemudian, W memfailkan permohonan ini menurut ss 83, 84, 96 dan 97 Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 untuk perintah persetujuan diubah dengan terma-terma berikut: (i) dia diberi hak penjagaan tunggal anak-anak (perintah persetujuan tidak pernah menyentuh mengenai perkara penjagaan); (ii) dia diberi hak jagaan, penjagaan dan kawalan kanak-kanak dengan H akan diberikan hak lawatan sahaja; (iii) H diarahkan untuk membayarnya jumlah sebanyak RM5,000 sebulan untuk nafkahnya dan RM10,000 sebulan untuk nafkah anak-anak, yang mana jumlah terakhir hendaklah dibayar terus ke dalam akaun banknya; (iv) H diperintahkan sama ada membayar elaun bulanan sebanyak RM2,500 untuk membenarkannya menyewa tempat tinggal di luar rumah suami isteri atau membelikannya harta kediaman yang sama nilai dengan rumah perkahwinan mereka; dan (v) bahawa penyata pendapatan H dilampirkan.

Diputuskan, menolak permohonan:

(1) W telah gagal mematuhi k 63 Kaedah-Kaedah Prosiding Perceraian dan Hal Ehwal Suami Isteri 1980 yang menghendakinya mengesahkan afidavit yang menyatakan butiran penuh harta dan pendapatannya. Kaedah 63 secara khusus relevan dalam kes ini kerana W berusaha untuk mengubah peruntukan kewangan untuk nafkah suami isteri dan anak dalam perintah persetujuan. Kegagalan W untuk membuat pendedahan di bawah k 63 menjejaskan permohonannya (lihat perenggan 8, 10 & 13–14).

(2) W gagal membuktikan bahawa hak tinggal bersama, jagaan dan kawalan anak-anak perlu diberikan kepadanya. Pelbagai tuduhan mengenai ketidakcekapan, pengabaian atau kegagalan H tidak disokong dan dicabar oleh H. Keterangan yang dikemukakan sebenarnya menunjukkan bahawa H telah berusaha secara proaktif untuk memenuhi tanggungjawab sebagai bapa. Persekitaran rumah yang disediakan untuk anak-anak mereka adalah menyokong dan bersesuaian dan menunjukkan penglibatan aktifnya untuk mewujudkan suasana yang stabil dan positif yang kondusif untuk kesejahteraan anak-anak tersebut. Keterangan menunjukkan bahawa H terlibat secara aktif dalam kehidupan anak-anak mereka dan proses tumbesaran mereka (lihat perenggan 31–33 & 36–37).

(3) Dalam kes ini, hak penjagaan dianggap menjadi tanggungjawab bersama kedua-dua ibu bapa melainkan alasan kukuh dikemukakan untuk

membuktikan sebaliknya. Dalam hal penjagaan, mahkamah perlu mengutamakan kepentingan terbaik anak-anak dengan mengambil kira faktor-faktor seperti kestabilan, kesejahteraan emosi dan keupayaan setiap ibu bapa untuk memberikan hak penjagaan. Memandangkan ketiadaan keterangan yang meyakinkan untuk menyokong hak penjagaan tunggal, tiada justifikasi untuk membubarkan penjagaan bersama sedia ada (lihat perenggan 47–48).

(4) Tiada justifikasi untuk membenarkan permohonan W untuk nafkah suami isteri yang lebih tinggi, terutamanya kerana dia bekerja dan dapat menyumbang kepada kestabilan kewangannya sendiri. Afidavit yang dikemukakan membuktikan bahawa W hidup di luar kemampuannya, menanggung perbelanjaan yang tidak wajar berdasarkan sumber kewangannya. Tabiat perbelanjaannya melebihi pendapatan dan asetnya yang boleh menampung kehidupan secara munasabah. Terdapat juga kekurangan ketelusan kewangan kerana W gagal mendedahkan pendapatan dan hartanya mengikut k 63 Kaedah-Kaedah Prosiding Perceraian dan Hal Ehwal Suami Isteri 1980. Peninggalan ini menjejaskan kredibiliti permohonannya dan melemahkannya dari segi prosedur (lihat perenggan 50–52 & 57–59).

(5) Tiada perubahan material dalam keadaan untuk mewajarkan perubahan arahan nafkah kanak-kanak sedia ada. H telah mengemukakan pecahan terperinci mengenai perbelanjaannya dan ianya menunjukkan bahawa dia menguruskan tanggungjawab kewangannya dengan berhemah dengan cara yang secukupnya untuk kesejahteraan anak-anak tersebut (lihat perenggan 61–62).

(6) Walaupun H mengakui bahawa dia mengalami kesukaran hidup dengan W, dia secara jelas menafikan bahawa dia telah mengusirnya dari rumah perkahwinan. Malah, H menentang W meninggalkan rumah perkahwinan mereka. Oleh itu, jelas sekali bahawa W mahu meninggalkan rumah itu atas kehendaknya sendiri dan bukan kerana sebarang tekanan atau paksaan daripada H (lihat perenggan 66).

(7) Laporan-laporan polis yang dilampirkan dalam afidavit W untuk menyokong dakwaannya bahawa H telah membuat ancaman yang menyebabkan dia bimbang akan keselamatannya dan menjadikannya mustahil baginya untuk kekal di rumah suami isteri mempunyai nilai pembuktian yang terhad kerana ianya hanyalah kenyataan yang mementingkan diri sendiri yang tidak disahkan secara bebas. Tanpa bukti yang dapat disahkan daripada sumber yang tidak berat sebelah atau pihak ketiga, dakwaan yang dibuat dalam laporan polis tetap tidak berasas. Laporan polis itu sendiri tidak memberikan asas yang mencukupi untuk mewajarkan perubahan perintah persetujuan untuk mengenakan kewajipan baru ke atas H untuk menyediakan tempat tinggal yang berasingan untuk W (lihat perenggan 67–70).

(8) Tiada keterangan yang menunjukkan bahawa urusan berkaitan dengan penjagaan dan nafkah anak-anak tersebut tidak memuaskan. W gagal membuktikan bahawa urusan penjagaan semasa adalah tidak munasabah atau memudaratkan kebajikan kanak-kanak dan patut diubah. Sebaliknya, H telah menunjukkan bahawa anak-anak tersebut dijaga dengan sebaik mungkin dalam persekitaran yang stabil dan menyokong (lihat perenggan 83–85).

(9) Permohonan W agar pendapatan H dilampirkan ditolak kerana ianya tidak boleh dijadikan sebahagian daripada permohonan ini. Dia harus memfailkan permohonan berasingan untuk tujuan itu. Kaedah 2 Kaedah-Kaedah Prosiding Perceraian dan Hal Ehwal Suami Isteri tidak termasuk lampiran pendapatan untuk 'relif sampingan'. Walau bagaimanapun, tiada asas atau keterangan yang dikemukakan untuk menyokong permohonan untuk pendapatan H dilampirkan (lihat perenggan 90–91 & 94).

(10) Sebaik sahaja pihak-pihak telah bersetuju dengan terma perintah persetujuan yang telah dimuktamadkan, ianya harus dihormati dan dipertahankan melainkan terdapat perubahan material dalam keadaan untuk mewajarkan perubahannya. Standard undang-undang untuk mengubah perintah mahkamah yang dipersetujui adalah ketat untuk menghalang pihak-pihak daripada mengubah semula terma yang didapati menyusahkan atau tidak menarik. Mahkamah ini tidak dapat mengubah semula terma yang telah dimuktamadkan hanya kerana terdapat perselisihan faham peribadi timbul antara pihak-pihak. Adalah penting bagi pihak-pihak untuk mengatasi perselisihan faham tersebut dan memberi tumpuan kepada tanggungjawab mereka, terutamanya dalam memastikan persekitaran yang stabil dan bekerjasama demi anak-anak mereka (lihat perenggan 71–72 & 101).]

Cases referred to

Anna Tay Siew Hong v Joseph Ng Tiong Yong [1995] MLJU 257; [1995] 3 CLJ 717, HC (refd)

Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo [2002] 2 MLJ 97; [2002] 1 CLJ 721, CA (refd)

Gan Koo Kea v Gan Shiow Lih (f) [2003] 4 MLJ 770; [2003] 4 CLJ 539; [2003] 6 AMR 459, HC (refd)

Gisela Gertrud Abe v Tan Wee Kiat [1986] 2 MLJ 297; [1985] CLJU 124; [1985] 1 LNS 124, SC (refd)

Lau Hui Sing v Wong Chuo Yong (f) [2008] 5 MLJ 846; [2008] 9 CLJ 232, HC (folld)

Lim Hong Bee v Mah Teck Oon [2010] MLJU 264; [2010] 8 CLJ 473, HC (refd)

Navarajan a/l Subramaniam v Rajeswary a/p Muniandy [2019] MLJU 715; [2019] CLJU 1014; [2019] 1 LNS 1014, HC (refd)

Ng Say Chuan (h) v Lim Szu Ling (w)and another application [2010] 4 MLJ 796; [2010] 10 CLJ 371, HC (refd)
Ngu Chu Chiong @ Ngu Choo Chiong v Lina Soo [2008] 3 MLJ 42; [2008] 2 CLJ 783, CA (refd)
Sean O' Casey Patterson v Chan Hoong Poh & Ors [2011] 4 MLJ 137; [2011] 3 CLJ 722, HC (folld)
Sim Bee Khim v Eugene Leong Weng Kong [2021] MLJU 1102; [2021] CLJU 916, HC (refd)
Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah [2006] 3 MLJ 184; [2006] 5 CLJ 318, HC (refd)
Tan Siew Kee v Chua Ah Boey [1988] 3 MLJ 20; [1987] 1 LNS 77, HC (refd)
Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433; [1987] CLJ Rep 24; [1987] MLRA 68, PC (refd)
Thelagavathi a/p Murugesu v Karuppusamy @ Selvaraj a/l K Munisamy [2010] MLJU 1887, HC (folld)
W v H [1987] 2 MLJ 235 (folld)
Wong Kim Foong (f) v Teau Ah Kau @ Chong Kwong Fatt [1998] 1 MLJ 359; [1998] 1 CLJ 358, HC (refd)
Yong Jia Hui v Chan Seh Wai [2023] MLJU 910; [2023] CLJU 762, HC (refd)

Legislation referred to

Divorce and Matrimonial Proceedings Rules 1980 rr 2, 61, 63
Evidence Act 1950 s 157
Guardianship of Infants Act 1961 ss 5, 11
Law Reform (Marriage and Divorce) Act 1976 ss 83, 84, 88(2), 96, 97
Married Women and Children (Enforcement of Maintenance) Act 1968 ss 4, 5, 7, 8

Lim Qing Yen (Gary Lee & Partners) for the petitioner-husband.
Chan Kang Wai (Ng Zainurul, Seke & Khoo) for the petitioner-wife.

Evrol Mariette Peters J:

INTRODUCTION

[1] This was an application ('this application') in encl 13 by the petitioner-wife, who sought to vary the terms of a consent order granted in March 2021.

[2] In the interest of privacy of all parties concerned, and sensitivity of the issues in these proceedings, the petitioner-husband and petitioner-wife have been anonymised in this judgment as GONG and HONG respectively.

A THE FACTUAL BACKGROUND

[3] The petitioners ('the parties') were married in December 2006, and were blessed with three children ('the children)' born respectively in 2009, 2011 and 2014.

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[4] In February 2021, the parties filed a joint petition for divorce in the Kuala Lumpur High Court, resulting in a court order issued in March 2021 ('the court order'). The following terms which were relevant to this application, had been agreed upon by the parties:

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(a) Hak jagaan, pemeliharaan dan kawalan (custody, care and control) untuk ***, *** dan *** (selepas ini dirujuk secara kolektif sebagai 'Anak-Anak tersebut') hendaklah diberikan kepada Pempetisyen Suami, dan bahawa Pempetisyen Isteri akan diberikan akses pada setiap masa, termasuk akses penginapan dengan Anak-Anak tersebut (access at all times, including staying access);

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(b) Pempetisyen-Pempetisyen menanggung sebanyak 50% daripada Nafkah Anak-Anak tersebut masing-masing, iaitu RM2,500.00 sebulan bagi Pempetisyen Suami dan RM2,500.00 bagi Pempetisyen Isteri dengan terma-terma seperti berikut:

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(i) Pempetisyen-Pempetisyen membuat bayaran Nafkah Anak-Anak tersebut sebelum hari ketujuh setiap bulan, mulai dari tarikh Dekri Nisi, dalam Bank Akaun Gabungan Pempetisyen-Pempetisyen di Hong Leong Bank Berhad No:*** (selepas ini dirujuk sebagai 'Akaun Gabungan HLBB');

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(ii) Pempetisyen-Pempetisyen hanya dibenarkan untuk membuat transaksi-transaksi pegeluaran wang yang meliputi perbelanjaan kos pendidikan, perbelanjaan hidup (living expenses), perbelanjaan dalam perubatan dan pergigian Anak-Anak tersebut; bil elektrik TNB, Syabas dan wifi untuk Hartanah Kediaman tersebut;

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(iii) Sekiranya bulanan Nafkah Anak-Anak tersebut adalah tidak mencukupi, Pempetisyen-Pempetisyen akan menanggung jumlah lebihan perbelanjaan secara sama rata;

(iv) Sekiranya Anak-Anak tersebut ingin meneruskan pelajarannya ke tahap pengajian ijazah (tertiary education) selepas sekolah menengah, Pempetisyen-Pempetisyen akan menanggung segala perbelanjaan dan yuran pengajian tinggi (tertiary education) Anak-Anak tersebut secara sama rata, dan

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(v) Nafkah bulanan tersebut, segala Perbelanjaan lebihan dan Perbelanjaan dan Yuran Pengajian Tinggi hendaklah diteruskan sehingga Anak-Anak tersebut mencapai umur 21 tahun atau menyelesaikan pengajian tinggi (Tertiary Education), mana yang lebih lewat.

I

...

(d) Pempetisyen Suami membayar nafkah sebanyak RM1,500.00 sebulan kepada Pempetisyen Isteri. Pempetisyen Suami hendaklah membayar nafkah tersebut

kepada Pempetisyen Isteri pada atau sebelum hari ketujuh setiap bulan, mulai dari tarikh Dekri Nisi. Pembayaran nafkah tersebut akan diberhentikan sekiranya Pempetisyen Isteri berkahwin semula;

(f) Pempetisyen Isteri dibenarkan untuk terus tinggal di dipegang dibawah Geran Mukim Nos. 608, 609 & 737, Lot Nos. 567, 568 & 566, Mukim dan Daerah Petaling, Tempat 8 1/2 Sungai Besi Kuyow, Negeri Selangor dan mempunyai alamat di C11-G-2, The Sanderson Villa, Jalan Cemara, Tmn Bukit Serdang, Seksyen 13, 43300 Seri Kembangan, Selangor ('Hartanah Kediaman tersebut') dengan terma-terma seperti berikut:

(i) Pempetisyen Isteri akan memiliki sebuah bilik (bilik kedua atau ketiga) sebagai bilik eksklusif Pempetisyen Isteri dimana Pempetisyen Suami tidak dibenarkan memasuki bilik tersebut tanpa keizinan Pempetisyen Isteri;

(ii) Pempetisyen-pempetisyen tidak dibenarkan membawa pasangannya atau kawan-kawan untuk menginap di Hartanah Kediaman dalam sebarang keadaan kecuali mendapat keizinan daripada Pempetisyen-Pempetisyen; dan

(iii) Pempetisyen Suami akan menanggung ansuran bulanan bank dan caj peryelenggaran Hartanah Kediaman tersebut termasuk kumpulan wang pelepas, insuran kebakaran (housing loan monthly instalments and maintenance charges including sinking fund, fire insurance).

[5] In December 2023, the petitioner-wife filed this application seeking several changes, including a transfer of custody, care, and control of the children from the petitioner-husband to herself, with the petitioner-husband to be granted visitation rights only. She also requested an increase in child and spousal maintenance, and for the petitioner-husband to either cover the cost of renting alternative accommodation for her or to purchase a house of equivalent value to the matrimonial home. Additionally, the petitioner-wife sought an attachment of the petitioner-husband's earnings.

THE ISSUES

[6] The main issues for consideration were as follows: (a) whether the petitioner-wife had complied with the correct procedure for filing this application; (b) whether a consent order should be open to variation; (c) whether material change in circumstances regarding custody and access had been established; (d) whether material change in circumstances regarding spousal and child maintenance had been established; (e) whether material change in circumstances regarding petitioner-wife's occupancy of the matrimonial home had been established; (f) whether the variation sought would be reasonable and for the welfare of the children; and (g) whether an attachment of earnings order was justified.

[7] This application was dismissed for the following reasons.

CONTENTIONS, EVALUATION, AND FINDINGS

Whether the petitioner-wife had complied with the correct procedure for filing this application

[8] At the outset, the issue was whether the petitioner-wife had complied with r 63 of the Divorce and Matrimonial Proceedings Rules 1980 ('the Divorce and Matrimonial Proceedings Rules'), which required her to affirm an affidavit setting out full particulars of her property and income. Rule 63 of the Divorce and Matrimonial Proceedings Rules reads:

> Rule 63 — Evidence on application for variation order
>
> (1) An application for a variation order shall be supported by an affidavit by the applicant *setting out full particulars of his property and income* and the grounds on which the application is made.
>
> The respondent to the application may, within 14 days after service of the affidavit, file an affidavit in answer. (Emphasis added.)

[9] The petitioner-wife contended that there was no necessity to comply with r 63 of the Divorce and Matrimonial Proceedings Rules, as she submitted that the applicable provision was r 61 of the Divorce and Matrimonial Proceedings Rules, which reads:

> Rule 61 — General provisions as to evidence etc. on application for ancillary relief
>
> (1) A petitioner or respondent who has applied for ancillary relief in his petition or answer and who intends to proceed with the application before a registrar shall, subject to Rule 84, file a notice in Form 12 and within four days after doing so serve a copy on the other spouse.
>
> (2) *Where a respondent or a petitioner is served with a notice in Form 11 or 13 in respect of an application for ancillary relief, not being an application to which Rule 62 or 63 applies then*, unless the parties are agreed upon the terms of the proposed order, he shall, within 13 days after service of the notice, file an affidavit in answer to the application containing full particulars of his property and income, and if does not do so, the court mat order him to file an affidavit containing such particulars.
>
> (3) Within 14 days after service of any affidavit under paragraph (2) or within such other time as the court may fix, the applicant shall file an affidavit in reply containing full particulars of his property and income. (Emphasis added.)

[10] In my view, the petitioner-wife's interpretation of rr 61 and 63 of the Divorce and Matrimonial Proceedings Rules was misguided. Rule 61 serves as the general guideline for applications regarding ancillary relief, while r 63 is

specifically relevant to this case, as it deals with the variation of financial provisions, particularly spousal and child maintenance.

[11] It was crucial to highlight that r 63 of the Divorce and Matrimonial Proceedings Rules mandates a full disclosure of property and income details. However, a perusal of the affidavits submitted by the petitioner-wife revealed that she had not provided a complete, honest, and transparent account of her assets, including both movable and immovable property, as well as her bank and credit card statements, which were necessary to detail her property and income.

[12] The importance of r 63 was underscored by the Court of Appeal in *Ngu Chu Chiong @ Ngu Choo Chiong v Lina Soo* [2008] 3 MLJ 42; [2008] 2 CLJ 783, where it was clearly stated that any application for variation must strictly adhere to the Divorce and Matrimonial Proceedings Rules. Non-compliance with these requirements would be detrimental to the success of such application.

[13] At this juncture, it was crucial to remind parties of the importance of complying with the rules of full disclosure of particulars of income and property. Such rules are undeniably to ensure not only transparency and equity, but also to facilitate proper assessment of financial needs and obligations of parties. The ultimate goal of such rules, therefore, was to promote fair and transparent resolution of the issues raised in this application.

[14] Since full particulars were not sufficiently disclosed, this application should have been dismissed. However, in the interest of completeness, I proceeded, nevertheless, to address the merits of this application.

Whether a consent order should be open to variation

[15] It was crucial to note that both parties had mutually agreed to the terms set out in the court order. The key issue, therefore, was whether terms that had been agreed upon by both parties could be subject to a variation application.

[16] On this point, I found instructive the case of *Lau Hui Sing v Wong Chuo Yong (f)* [2008] 5 MLJ 846; [2008] 9 CLJ 232, where it was stated by Hamid Sultan Abu Backer J (as he then was) in the following passage:

> As a general rule, *consent order even in a divorce matter must be rarely disturbed unless there are exceptional circumstances* and that too clearly stated in the affidavit to warrant the intervention of the court for the benefit of the minor children.
>
> Applying the above principle to the present case, the consent order must be honoured and complied with strictly by both parties, including the petitioner husband, since it was entered into voluntarily. (Emphasis added.)

[17] The court's attention was also brought to the cases of *Ng Say Chuan (h) v Lim Szu Ling (w)and another application* [2010] 4 MLJ 796; [2010] 10 CLJ 371, and *Sim Bee Khim v Eugene Leong Weng Kong* [2021] MLJU 1102; [2021] CLJU 916.

[18] In *Ng Say Chuan v Lim Szu Ling (f) and another application,* it was clarified by Yeoh Wee Siam JC (as she then was) in the following passage:

> Bearing in mind again that the interim order is a *consent order*, it therefore *must be honoured and complied with by both parties*. As far as possible, a consent order *must rarely be disturbed* unless there are exceptional circumstances that warrant the intervention of the court. (Emphasis added.)

[19] In *Sim Bee Khim v Eugene Leong Weng Kong*, Hayatul Akmal Abdul Aziz J, in endorsing *Ng Say Chuan v Lim Szu Ling (f) and another application,* held as follows:

> ... An order can be varied at any time by the court based on any circumstances so provided. *Ng Say Chuan v Lim Szu Ling* said that *a consent order must rarely be disturbed unless there are exceptional circumstances that warrant the intervention of the court*. It is trite that consent orders must rarely be disturbed unless there are exceptional circumstances that warrant the intervention of the court, and the burden is on RH to prove on a balance of probabilities that the need to vary legally existed. (Emphasis added.)

[20] Given this consensual basis, the court had to approach this application with careful consideration. This cautious approach was necessary because varying the terms of the court order that were previously consented to by both parties was not a trivial matter. Varying these terms required a compelling justification.

[21] Such careful approach by this court was warranted to ensure respect for the terms agreed upon by the parties and to promote stability and predictability in legal arrangements established through mutual consent. By requiring substantial reasons for any variation, the court strived to maintain the integrity of the consent order, thereby and agreed upon. This predictability was essential in legal contexts as it provided certainty and clarity for parties involved, reducing the likelihood of frequent and arbitrary changes to legal orders and fostering a more stable legal environment.

[22] A cautious approach was, therefore, adopted in meticulously scrutinising the petitioner-wife's assertions, to ensure that this application was not based on irrelevant factors.

Material change in circumstances

[23] At the outset, it was important to note that this application was based on the following provisions, namely ss 83, 84, 96, and 97 of the Law Reform (Marriage and Divorce) Act 1976 ('the Law Reform (Marriage and Divorce) Act'), all of which read:

> Section 83 — Power for court to vary orders for maintenance
>
> The court may at any time and from time to time vary, or rescind, *any subsisting order for maintenance*, whether secured or unsecured, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of secured maintenance, of the legal personal representatives of the latter, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where *there has been any material change in the circumstances*.
>
> Section 84 — Power of court to vary agreements for maintenance
>
> Subject to section 80, the court may at any time and from time to time vary the *terms of any agreement as to maintenance* made between husband and wife, whether made before or after the appointed date, where it is satisfied that there has been *any material change in the circumstances* and notwithstanding any provision to the contrary in any such agreement.
>
> Section 96 — Power for court to vary orders for custody or maintenance
>
> The court may at any time and from time to time vary, or may rescind, any order *for the custody or maintenance of a child* on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or *where there has been any material change in the circumstances*.
>
> Section 97 — Power for court to vary agreement for custody or maintenance
>
> The court may at any time and from time to time vary the terms of any *agreement relating to the custody or maintenance of a child*, whether made before or after the appointed date, notwithstanding any provision to the contrary in any such agreement, *where it is satisfied that it is reasonable and for the welfare of the child so to do*. (Emphasis added.)

[24] Although it was not specifically articulated in submissions, the affidavits and submissions by the petitioner-wife indicated that the main ground she relied upon was material change in circumstances as stipulated in ss 83, 84 and 96 of the Law Reform (Marriage and Divorce) Act.

[25] The phrase 'material change' has been emphasised in the case of *Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah* [2006] 3 MLJ 184; [2006] 5 CLJ 318 to mean not simply any change, as the operative word is 'material'. Such phrase has also been explained by George Seah SCJ in the Supreme Court case of *Gisela Gertrud Abe v Tan Wee Kiat* [1986] 2 MLJ 297; [1985] CLJU 124; [1985] 1 LNS 124, in the following passage:

> In our opinion, when an application is made to the court to vary an existing order for maintenance, *the proper approach is to start from the original order and see what changes financial or otherwise, have taken place since that date* including any changes

A which the court is required to have regard to under s 78 of the Act as well as any increase or decrease in the means of either of the parties to the marriage and make adjustments roughly in proportion to the changes, if that is possible. (Emphasis added.)

B **[26]** Further elaboration of 'material change in circumstances' may be found in *Lim Hong Bee v Mah Teck Oon* [2010] MLJU 264; [2010] 8 CLJ 473, where it was stated by Suraya Othman J (as she then was) that 'the change in question must be material and not just any change. It means a change in a crucial and vital part. In considering whether there has been any 'material change' within C the meaning of this section, all the relevant circumstances must be taken into account'.

[27] Hence, in examining the question of material change in circumstances, the inquiry is not simply whether there has been any material change per se D since the court order was granted. The change must be sufficiently material, such that expecting the status quo to remain would not be justified.

[28] It was also crucial to note that the question of whether there was a E material change in circumstances is a question of fact, as decided in the High Court case of *Anna Tay Siew Hong v Joseph Ng Tiong Yong* [1995] MLJU 257; [1995] 3 CLJ 717. Reference was made also to the case of *Navarajan a/l Subramaniam v Rajeswary a/p Muniandy* [2019] MLJU 715; [2019] CLJU 1014; [2019] 1 LNS 1014, where it was stated by Hayatul Akmal Abdul Aziz J, in the following passage: F

> The legal definition of material change in circumstances is not cast in stone. It is ultimately *dependent upon the facts and circumstances of each case*. No one case is like the other. (Emphasis added.)

G **[29]** As such, the petitioner-wife had the legal burden to prove on a balance of probabilities that there was in fact material change in circumstances pertaining to the terms of the current sole custody order as well as spousal and child maintenance that were mutually consented and agreed to.

H *Whether material change in circumstances regarding custody and access had been established*

[30] In this application, the petitioner-wife sought a transfer of custody, care, and control of the children from the petitioner-husband to herself, with the I petitioner-husband to be granted visitation rights only.

[31] In her effort to persuade the court that there was material change in circumstances warranting a variation of the terms of the court order pertaining to custody, the petitioner-wife presented a range of allegations against the

petitioner-husband. These allegations were made in an attempt to demonstrate that his parenting skills were detrimental to the well-being of the children. Specifically, the petitioner-wife alleged that the:

(a) petitioner-husband lacked the ability or commitment to provide adequate care for the children. This claim implied that the petitioner-husband was either unwilling or incapable of meeting the day-to-day needs of the children, such as providing a stable and nurturing environment;

(b) petitioner-husband had not adequately supervised the children's education or enforced discipline. The petitioner-wife claimed that the petitioner-husband's lax approach negatively impacted the children's academic performance and behavioural development, potentially affecting their long-term growth and self-discipline;

(c) petitioner-husband had allowed the children to miss tuition classes. This claim implied that the petitioner-husband had not prioritised or respected the additional educational support intended to help the children succeed academically. In her view, the absence from these classes reflected his failure to prioritise their academic needs;

(d) petitioner-husband had left the children unattended when he travelled out of town. The petitioner-wife contended that this action posed a risk to the children's safety and showed a lack of appropriate parental supervision. The petitioner-wife further submitted that leaving them without adequate care could have subjected them to unnecessary risks and isolation, compromising their well-being; and

(e) petitioner-husband had neglected the children's health, suggesting that he had not taken appropriate steps to maintain or monitor their physical and emotional health. The petitioner-wife alleged that such neglect had demonstrated a disregard by the petitioner-husband for the children's welfare and had put their health at risk.

[32] The petitioner-wife's allegations aimed to demonstrate a pattern of behaviour on the part of the petitioner-husband that, in her view, constituted a material change in circumstances significant enough to justify varying the terms of the custody arrangement stipulated in the court order. She contended that the petitioner-husband's actions, or lack thereof, illustrated a disregard for the children's best interests and compromised their development, safety, and overall well-being.

[33] I was unable to accept the petitioner-wife's contention for the following reasons. First and foremost, most of the allegations were unsubstantiated, and were challenged by the petitioner-husband in his affidavits. It was imperative to emphasise, at this stage, that affidavit evidence, given its inherent conflicts,

A cannot serve as the sole basis for deciding the truth of the matters averred, without the opportunity for cross examination of the makers of the affidavits. To illustrate this principle, reference was made to the case of *Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo* [2002] 2 MLJ 97; [2002] 1 CLJ 721, in which the following was elucidated by Siti Norma Yaakob JCA (as she then
B was):

> Faced with such conflicting affidavit evidence, what the trial judge should have done was to sieve through such evidence, *consider only those that are undisputed or uncontroverted* and balance these with the consideration of what would work towards the betterment and interests of the four children. (Emphasis added.)

C

[34] The court's attention was also brought to the case of *Gan Koo Kea v Gan Shiow Lih (f)* [2003] 4 MLJ 770; [2003] 4 CLJ 539; [2003] 6 AMR 459, where it was emphasised that in light of conflicting accounts that have not been
D subjected to the rigorous processes of cross-examination and re-examination, which would occur in a full trial with *viva voce* evidence, the court's duty was to disregard the disputed facts. Instead, the court was obligated to base its decision solely on the undisputed facts.

E **[35]** This fundamental aspect of civil litigation practice has been eloquently summarised by Lord Templeman for the Privy Council in *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; [1987] CLJ Rep 24; [1987] MLRA 68, in the following words:

> At the end of the day the judge must decide the petition on the evidence before him.
F If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then *in the absence of oral evidence or cross examination, the judge must ignore the disputed allegations*. The judge must then decide the fate of the petition by consideration of the undisputed facts. (Emphasis added.)

G

[36] In response to the allegation that the petitioner-husband was an absent father, no evidence was presented to substantiate such claim. On the contrary, the evidence adduced had highlighted the petitioner-husband's proactive efforts to meet his parental responsibilities. Moreover, the home environment
H he provided for the children was characterised as supportive and nurturing, underscoring his active involvement in creating a stable and positive atmosphere conducive to the children's well-being.

[37] In response to the allegation that the petitioner-husband neglected the
I petitioner-wife to substantiate such claim. On the contrary, evidence presented by the petitioner-husband highlighted his active involvement in the children's lives and his efforts to positively contribute to their upbringing. This evidence portrayed a father who was engaged and committed to learning and growing in his role, rather than one who was neglectful or absent. This context was

essential in evaluating the allegations made against the petitioner-husband regarding his parenting skills and involvement with the children. A

[38] With regard to skipping school, missing tuition classes, choir and Latin dance competitions, the petitioner-husband admitted that he had done so, but that it was to enable him to return to his hometown. Despite such admission, I was unable to accept this as material change in circumstances for the following reasons. B

[39] First and foremost, it was important to clarify that activities such as tuition, choir, and Latin dance do not fall within the legal definition of 'education.' Tuition classes are meant to supplement formal education and are not compulsory. Choir and Latin dance focus mainly on artistic skills, such as rhythm, movement, melody, and harmony. While these skills may be valuable, they are not considered core competencies in most educational systems, which emphasise academic subjects like literacy, numeracy, and scientific knowledge — foundations essential for broader educational and career opportunities. C D

[40] The decision to enrol a child in tuition or additional classes is a personal choice that varies from parent to parent. Some parents choose extensive tutoring to boost their child's academic performance and reinforce learning, while others favour a more balanced approach. They believe that overloading a child with too many extra activities can lead to stress and diminish the time available for formal homework, relaxation, and quality family moments. Each family's priorities and beliefs about what best supports a child's development play a significant role in these decisions. E F

[41] Given that the petitioner-husband had sole custody, care, and control of the children, he was not legally required to ensure the children's participation in these activities. G

[42] It was crucial to also note the undisputed fact that the petitioner-wife herself had previously caused the children to miss school so that she could take them on a vacation. For her now to accuse the petitioner-husband of similar behaviour revealed a clear double standard, bordering on hypocrisy. If the petitioner-wife herself engaged in this conduct without objection, it was only fair to hold her to the same standard. As the saying goes, 'what is sauce for the goose is sauce for the gander', and thus, her criticism lacked credibility and was unacceptable. H I

[43] As far as missing school was concerned, although it must be frowned upon, a single instance of missing class, did not, in my view, reflect a lapse in parental responsibility or a disregard for the children's educational needs.

Consequently, this decision should not be seen as grounds to vary the established terms of custody or parenting arrangements set forth in the court order.

[44] The petitioner-wife also alleged that the petitioner-husband left the children at home alone, unsupervised, while he travelled out of town. Upon reviewing the affidavits, however, it became evident that the petitioner-wife was aware of the petitioner-husband's travel plans. I must, therefore, agree with the petitioner-husband's assertion that the petitioner-wife selectively highlighted incidents to bolster her case in this application.

[45] Furthermore, although the children were indeed unsupervised, the eldest child at that time was 14 years old, which suggested a reasonable degree of maturity. In this context, I found it difficult to understand the concern raised. As the saying goes, 'one swallow does not make a summer', and as such, a single, isolated incident could not reasonably be considered a substantial change in circumstances sufficient to justify varying the terms of the court order.

[46] The petitioner-wife had additionally sought sole guardianship of the children. However, it was important to note that the court order did not address the matter of guardianship. Given this omission, it was decided that, in the interest of justice, guardianship should be shared. This was reflected in s 5 of the Guardianship of Infants Act 1961 ('the Guardianship of Infants Act'), which reads:

> Section 5 — Equality of parental rights
>
> (1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and *the rights and authority of mother and father shall be equal*.

[47] In the present case, guardianship was presumed to be a joint responsibility between both parties unless compelling reasons were presented to warrant otherwise. The petitioner-wife prayed for sole guardianship; however, she had not provided sufficient evidence or arguments to substantiate why such an arrangement would better serve the children's welfare.

[48] In matters of guardianship, the court had to prioritise the best interests of the children, taking into account factors such as stability, emotional well-being, and the ability of each parent to provide care. Given the absence of convincing evidence to support a sole guardianship arrangement, the court found no justification to deviate from the default joint guardianship structure.

Whether material change in circumstances regarding spousal and child maintenance had been established

[49] According to the court order, the petitioner-wife was to receive a monthly spousal maintenance of MYR1,500. In this application, she sought for an increase to a monthly sum of MYR5,000. The gist of this application which sought to vary the terms pertaining to spousal maintenance was that the petitioner-wife's funds were insufficient to support herself.

[50] I was unable to accept the petitioner-wife's contention for several reasons. First and foremost, it is a well-established legal principle that spousal maintenance is determined based on the 'means and needs' of the parties involved, rather than their 'means and wants'. The purpose of spousal maintenance is to provide for the reasonable needs of a party who may not be financially independent, and not to accommodate a lifestyle that exceeds their financial capability.

[51] Upon carefully reviewing the affidavits submitted, it was evident that the petitioner-wife had been living beyond her means, incurring expenses that were not justifiable based on her financial resources. She was obviously not 'cutting her coat according to her cloth'.

[52] Such behaviour raised concerns about her ability to manage her finances responsibly. The documents adduced highlighted that her spending habits exceeded what her income and assets could reasonably support. This suggested that her claims for higher maintenance were not grounded in a genuine need but rather in an attempt to sustain a lifestyle she could not afford without undue financial support from the respondent. Consequently, I could not find sufficient justification for granting the requested level of maintenance.

[53] It was also crucial to emphasise to both parties that financial maintenance awarded to a former spouse is meant to provide essential support, rather than a source of ongoing income or financial windfall. The primary objective of spousal maintenance is to ensure that the former spouse would be able to maintain a reasonable standard of living while transitioning to a more self-reliant and stable financial situation post-divorce. This financial support is meant to address the genuine needs that may arise as a result of the breakdown of the marriage, rather than to prolong financial dependence indefinitely.

[54] The expectation is that the recipient spouse will actively work towards self-sufficiency over time, acknowledging that the paying spouse is not obligated to provide indefinite financial support. In this regard, spousal maintenance serves as a temporary bridge, a means to help the recipient stabilise and adjust to life outside the marriage. Spousal maintenance is

designed to assist the former spouse in rebuilding his or her independence, acquiring new skills, or re-entering the workforce if necessary. Spousal maintenance, therefore, is transitional support, encouraging both individuals to pursue their respective lives independently and responsibly.

[55] In the present case, the petitioner-wife was already receiving a monthly spousal maintenance allowance, which had been specifically designed to assist her in meeting her financial needs following the divorce. This regular financial support was intended to provide her with a stable foundation during the post-divorce transition, allowing her to maintain a reasonable standard of living. The expectation was that, with this ongoing maintenance, the petitioner-wife would responsibly manage her financial obligations and adjust her lifestyle to fit within the bounds of the financial support provided.

[56] Expecting additional financial assistance beyond what had already been allocated would be avaricious, unreasonable and inequitable. The petitioner-husband should not be burdened with the expectation of providing ongoing additional spousal support simply because the petitioner-wife chose to live beyond her means. Without evidence of extraordinary circumstances — such as unforeseen health issues, significant changes in living conditions, or other substantial hardships — there was no justifiable reason to increase the financial burden on the paying spouse, namely the petitioner-husband.

[57] I also noted that while it was undisputed that the petitioner-wife was currently employed, she had failed to disclose her income and assets in accordance with r 63 of the Divorce and Matrimonial Proceedings Rules. This omission undermined the credibility of this application and rendered it procedurally flawed. Transparency regarding financial circumstances was a fundamental requirement in these proceedings, as it ensured that any decision regarding spousal maintenance would be based on a complete and accurate picture of the parties' financial situations. The petitioner-wife's failure to comply with this disclosure requirement had cast doubt on the legitimacy of her claims for an increase in spousal maintenance.

[58] Moreover, the fact that the petitioner-wife was employed indicated that she had the capacity to generate her own income and contribute to her own financial stability. Employment provides an opportunity for self-sufficiency, and the expectation is that the earning spouse will take reasonable steps to support themselves to the fullest extent possible. The petitioner-wife's ability to earn an income was a key consideration, suggesting that an increase in spousal maintenance was not justified.

[59] In light of these factors, the lack of financial transparency, coupled with her ability to generate income, significantly weakened the merits of this application for an increase in spousal maintenance.

[60] With regard to child maintenance, in accordance with the court order, both parties were required to contribute RM2,500 each to a shared fund for the children, with any additional expenses to be equally divided between the parties. In this application, the petitioner-wife requested child maintenance of MYR10,000, to be paid directly into her bank account, based on her claim for sole custody, care, and control of the children.

[61] I was unable to accept the petitioner-wife's contention for the following reasons. The first crucial point to highlight was that I concluded that there would be no variation to the existing terms concerning the custody, care, and control of the children. This decision was based on the absence of material change in circumstances that would justify an adjustment to the current child maintenance arrangement. Without a significant alteration in the living situation, needs, or well-being of the children, there was no compelling reason to increase the child maintenance amount.

[62] Furthermore, the petitioner-husband, who has sole custody, care, and control of the children, presented a detailed breakdown of their expenses. After reviewing this information, I found that the current financial arrangement was appropriate and adequately addressed the children's needs. The evidence indicated that the petitioner-husband's monthly income was approximately RM14,000, of which RM12,000 was allocated to cover his ongoing monthly commitments, including expenses for the children. This suggested that he was managing his financial responsibilities prudently and in a manner that adequately provided for the children's well-being.

[63] Based on the evidence adduced, it was clear that the current child maintenance arrangement was sufficient to support the children's reasonable expenses and maintain their standard of living. Therefore, without any material change in circumstances or evidence of additional financial needs, there was no justification for revising the financial terms in the court order.

Whether material change in circumstances regarding petitioner-wife's occupancy of the matrimonial home had been established

[64] According to the court order, despite the divorce, the petitioner-wife had the liberty of continuing to reside in the matrimonial home, with a room exclusively reserved for her, which was off-limits to the petitioner-husband.

[65] In this application, the petitioner-wife asserted that the petitioner-husband had forced her to leave the matrimonial home, rendering her unable to continue residing there. As a result, she requested for the court to order the petitioner-husband to provide a monthly rental allowance of RM2,500 to cover her housing expenses. Alternatively, she sought an order for the petitioner-husband to purchase a new property of equivalent value to the matrimonial home for her use.

[66] In my view, the petitioner-wife's claim was without merit and lacked foundation. While the petitioner-husband conceded that the parties were experiencing significant difficulties living together, he explicitly denied that he had expelled her from the matrimonial home. The evidence adduced suggested that the parties had ongoing disputes over their living arrangements, but there was no credible indication that the petitioner-husband had forcibly removed or banished the petitioner-wife from the matrimonial home. On the contrary, the evidence adduced clearly demonstrated that the petitioner-husband was against her decision to leave. It appeared, therefore, that the petitioner-wife's departure was a unilateral choice, and not one driven by any coercive action on the part of the petitioner-husband.

[67] The petitioner-wife, in her affidavit in support, included several police reports in which she alleged that the petitioner-husband had made threats that caused her to fear for her safety. These reports were adduced as evidence by the petitioner-wife to substantiate her claim that the petitioner-husband's behaviour made it impossible for her to remain in the matrimonial home.

[68] In evaluating the relevance and weight of these police reports, attention must be given to s 157 of the Evidence Act 1950 ('the Evidence Act'), which states:

> Section 157 — Former statements of witness may be proved to corroborate later testimony as to same fact
>
> In order to corroborate the testimony of a witness, any former statement *made by him* whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or *before any authority legally competent to investigate the fact*, may be proved. (Emphasis added.)

[69] The police reports lodged by the petitioner-wife carried limited probative value, as they amounted to self-serving statements that lacked independent verification. Without corroborating evidence from an impartial or third-party source, the allegations made by the petitioner-wife in these police reports remain unsubstantiated. Specifically, there was no independent evidence supporting her claim that the petitioner-husband had forcibly banished her from the matrimonial home.

[70] As a result, the police reports alone did not provide a sufficient basis to justify varying the existing court order to impose a new obligation on the petitioner-husband to secure separate accommodation for the petitioner-wife. Such material change required more compelling and reliable evidence beyond the unsupported assertions made in the police reports.

[71] I felt it necessary to remind both parties at this stage that the current terms of their living arrangement were those that were mutually agreed upon. This court was not in a position to reconsider those terms solely due to disagreements or disputes that have since arisen between them. The petitioner-wife's request to vary the terms of the court order, based merely on conflicts she had with the petitioner-husband, lacked the necessary legal justification for intervention.

[72] Moreover, I observed that the behaviour exhibited by both parties reflected a lack of maturity. As parents of three children, it was crucial that they rise above these personal disagreements and focus on their responsibilities, particularly in ensuring a stable and cooperative environment for the sake of the children. Their conduct should reflect the gravity of their roles as parents, and they should demonstrate a greater commitment to acting in the best interests of their family.

Whether the variation sought would be reasonable and for the welfare of the children

[73] At the outset of the proceedings, it was observed that the petitioner-wife had based her application on several key provisions of the Law Reform (Marriage and Divorce) Act, specifically ss 83, 84, 96, and 97. The criteria outlined in ss 83, 84, and 96 require material change in circumstances, while s 97 empowers the court to vary terms of an *agreement* relating to *the custody or maintenance of a child*, where it was satisfied that it was *reasonable and for the welfare of the child so to do*.

[74] The petitioner-wife argued that, since the terms were established in a consent order, s 97 of the Law Reform (Marriage and Divorce) Act was applicable. She maintained that a consent order constituted an agreement, and therefore the court must determine whether modifying the terms would be reasonable and in the best interests of the children's welfare.

[75] At this point, I was obliged to clarify that the petitioner-wife's interpretation of s 97 of the Law Reform (Marriage and Divorce) Act was incorrect. This was because the parties had previously agreed to the divorce and formalised a consent order through a joint petition, making the resulting order a court order under s 96 of the Law Reform (Marriage and Divorce) Act. It was

not merely an agreement as defined under s 97 of the Law Reform (Marriage and Divorce) Act, terms of which the petitioner-wife was now attempting to vary.

[76] I drew guidance from the case of *W v H* [1987] 2 MLJ 235. In that case, the court was tasked with applying the Law Reform (Marriage and Divorce) Act to vary an agreement independently entered into by both the husband and wife. The crucial aspect of this case was that it concerned a separation agreement that was signed privately by both parties, without any judicial involvement or endorsement.

[77] The circumstances in *W v H* were markedly different from the present case, where the document in question was a consent order. Unlike a privately negotiated agreement, a consent order is formally issued by the court, carrying the authority and endorsement of the judiciary. This distinction meant that the consent order at issue was, in essence, a court order, and not merely an agreement between parties. The precedent set in *W v H* highlighted the importance of differentiating between judicially sanctioned orders and private agreements, as the legal implications and criteria for modification under each section of the law are significantly different. This distinction was essential for accurately identifying the appropriate legal framework for varying the terms outlined in the court order in question.

[78] As a result, I was of the opinion that s 97 of the Law Reform (Marriage and Divorce) Act did not apply to this application. However, to ensure that all arguments were fully examined and addressed, I proceeded to assess the merits of this application under s 97 of the Act. This approach was taken to guarantee that every aspect of the case was considered and that justice was administered thoroughly, demonstrating careful judicial evaluation even in light of procedural inconsistencies.

[79] Pursuant to s 97 of the Law Reform (Marriage and Divorce) Act, the requirements that needed to be proved were whether the variation was reasonable and in the interest of the welfare of the children.

[80] The welfare of the children, undeniably, served as the 'golden thread' throughout these proceedings. This requirement is enshrined not only in s 11 of the Guardianship of Infants Act but also in s 88(2) of the Law Reform (Marriage and Divorce) Act, both of which read:

> *Guardianship of Infants Act 1961*
>
> Section 11 — Matters to be considered
>
> The Court or a Judge, in exercising the powers conferred by this Act, *shall have regard primarily to the welfare of the infant* and shall, where the infant has a parent or

parents, consider the wishes of such parent or both of them, as the case may be. A

Law Reform (Marriage and Divorce) Act 1976

Section 88 — Power of court to make order for custody

...

(2) In deciding in whose custody a child should be placed *the paramount consideration shall be the welfare of the child* and subject to this the court shall have regard — (Emphasis added.) B

[81] I was also guided by the Federal Court in *Sean O' Casey Patterson v Chan Hoong Poh & Ors* [2011] 4 MLJ 137; [2011] 3 CLJ 722, in its reference to the Singapore case of *Tan Siew Kee v Chua Ah Boey* [1988] 3 MLJ 20; [1987] 1 LNS 77, wherein the expression 'welfare of the child' was explained by Chan Sek Keong JC (as he then was), in the following passage: C

The expression 'welfare' ... is to be taken in its widest sense. It means the general well-being of the child and all aspects of *his upbringing, religious, moral as well as physical. His happiness, comfort and security also go to make up his well-being. A loving parent with a stable home is conducive* to the attainment of such well-being. It is not to be measured in monetary terms. (Emphasis added.) D

E

[82] To reach a well-informed decision, this court had to meticulously examine the notion of the 'welfare of the child' in its most expansive context, considering all pertinent factors and judiciously balancing them. Given the distinctive circumstances inherent in each case, offering an exhaustive list of specific considerations was not feasible. F

[83] As alluded to in the earlier part of this judgment, there was no evidence that the current arrangement pertaining to the custody and maintenance of the children were unsatisfactory. The petitioner-wife had failed to prove that the terms of the current arrangement were unreasonable or detrimental to the welfare of the children. In addition, the petitioner-husband had demonstrated that the children were taken care of to the best of his ability. G

[84] I also had grave concerns regarding the potential impact on the children's environment if this application was allowed. Based on the evidence presented, it was my view that the children's current environment was satisfactory. This environment was not only supported by the presence of the petitioner-husband but also by the surrounding circumstances. The petitioner-husband had adduced evidence that demonstrated the children's living arrangements, underscoring a stable and supportive setting. In contrast, the petitioner-wife failed to demonstrate to the court any arrangement that would ensure a comfortable, conducive, and stable living environment for the children. H I

[85] Furthermore, the children have remained in the matrimonial home, a place where they had spent the entirety of their upbringing and where they had developed a sense of familiarity, stability, and routine. The continuity of this environment was important, as it had been central to their sense of security and normalcy throughout their lives.

[86] This position was reinforced by the precedent established in the case of *Wong Kim Foong (f) v Teau Ah Kau @ Chong Kwong Fatt* [1998] 1 MLJ 359; [1998] 1 CLJ 358, where the court stressed the importance of maintaining a child's stability by preserving their familiar surroundings and relationships.

[87] In contrast, the petitioner-wife's decision to unilaterally move out of the matrimonial home and reside in a rental property nearby would not provide the same stability for the children. This rented accommodation lacked the permanence and consistency of the matrimonial home, making it difficult for her to offer the same secure environment. The unpredictability associated with rented housing, including potential changes in tenancy and the temporary nature of the arrangement, posed a challenge to maintaining a stable and certain environment for the children.

[88] Given these considerations, the decision to leave the matrimonial home appeared to have disrupted the children's sense of continuity, which was essential for their well-being and development.

Whether an attachment of earnings order was justified

[89] The petitioner wife, in claiming that the petitioner-husband did not pay child maintenance, sought for an attachment order on the petitioner-husband's employer company, NXP Malaysia Sdn Bhd, to automatically deduct all the payments payable (if any) to the petitioner-wife from the petitioner-husband's monthly salary. This relief was based on ss 4, 7, and 8 of the Married Women and Children (Enforcement of Maintenance) Act 1968, all of which read:

> Section 4 — Power of court to make an attachment of earnings order
>
> (1) Notwithstanding any written law to the contrary, the court may, upon the application of the person for whose maintenance the order is made or the guardian of such person, make an attachment of earnings order if the court considers it just so to make.
>
> (2) An application for an attachment of earnings order may be made in the proceedings in which a maintenance order is applied for or in any subsequent proceedings.

Section 7 — Duty of defendant and employer to comply with attachment of earnings order

(1) A person to whom an attachment of earnings order is directed shall, notwithstanding anything in any other written law but subject to this Act, comply with the order or, if the order is subsequently varied under section 6, with the order as so varied.

(2) Where on any occasion on which earnings are to be paid to a defendant there are in force two or more attachment of earnings orders relating to those earnings, then, for the purpose of complying with this Act the employer shall —

(a) deal with those orders according to the respective dates on which they came into force disregarding any later order until all earlier orders have been dealt with; and

(b) deal with any later order as if the earnings to which it relates were the residue of the defendant's earnings after the making of any payment under this Act in pursuance of any earlier order.

(3) An employer, who in pursuance of an attachment of earnings order makes a payment under this Act, shall give to the defendant a statement in writing specifying the amount of that payment.

(4) Where the person to whom an attachment of earnings order is directed has, during the period of one month immediately preceding the day on which the order is served on him, on no occasion been the defendant's employer, he shall forthwith give notice in writing to that effect in the prescribed form to the court.

Section 8 — Additional powers of court in attachment of earnings order proceedings

(1) Where proceedings relating to an attachment of earnings order are brought in any court, *the court may*, either before or at the hearing —

(a) order the defendant to give to the court, within such period as may be specified by the order, a statement signed by him of —

(i) the name and address of his employer, or of each of his employers if he has more than one;

(ii) such particulars as to the defendant's earnings as may be so specified;

(iii) such prescribed particulars as may be so specified for the purpose of enabling the defendant to be identified by an employer of his; and

(b) *order any person appearing to the court to be an employer of the defendant to give to the court, within such period as may be specified by the order, a statement signed by him or on his behalf of such particulars as may be specified by the order, of all earnings of the defendant which are to be paid by that person during such period as may be so specified*. (Emphasis added.)

[90] I did not grant the order for attachment of the petitioner-husband's earnings for the following reasons. First and foremost, this application was specifically for ancillary relief. According to r 2 of the Divorce and Matrimonial Proceedings Rules, 'ancillary relief' is defined as any of the following:

(a) an avoidance of disposition order;

(b) a financial provision order;

(c) an order for maintenance pending suit;

(d) a property adjustment order; or

(e) a variation order.

[91] Rule 2 of the Divorce and Matrimonial Proceedings Rules does not include an attachment of earnings order within the definition of ancillary relief. If the petitioner-wife intended to pursue an attachment of earnings order, she should have filed a separate application. This application, which was for ancillary relief, should not be confused with an application for attachment of earnings.

[92] On this note I drew guidance from the case of *Thelagavathi a/p Murugesu v Karuppusamy @ Selvaraj a/l K Munisamy* [2010] MLJU 1887. In that case, the plaintiff-wife included a request for an attachment of earnings order within her application to vary the existing court order concerning maintenance payments that the defendant-husband was obligated to provide for their child. This prayer was part of her broader relief for variation to the maintenance order, which aimed to secure a more reliable and direct method of payment by attaching a portion of the defendant-husband's income.

[93] However, the court in that case, dismissed this specific relief for an attachment of earnings on procedural grounds, as the plaintiff-wife had not followed the correct procedure as prescribed by law. Under the Married Women and Children (Enforcement of Maintenance) Act, the court held that an attachment of earnings order must be sought explicitly under s 5, which provides a dedicated legal mechanism for enforcing maintenance orders through direct deductions from the payer's income.

[94] Additionally, in the present case, there was no sufficient basis or evidence presented to support her request for an attachment of earnings order.

[95] Moreover, an attachment of earnings order is a significant and stringent enforcement measure, one that requires careful consideration by the court. The discretion involved in granting such an order was emphasised in the case of *Yong Jia Hui v Chan Seh Wai* [2023] MLJU 910; [2023] CLJU 762, as

highlighted in the following passage:

> [25] It must also be borne in mind that *an attachment of earnings order is a severe form of enforcement* as it involves the court ordering the respondent's employer to make monthly deductions, which in turn would reduce the respondent's income. It is also a form of declaration of the respondent's financial conundrum which may be embarrassing and damaging to his reputation. Furthermore, I had to note that the respondent had been regular in making the monthly payment of MYR2,000. (Emphasis added.)

[96] Based on the facts and circumstances of this case, it was my view that an attachment of earnings order would not serve the interest of justice.

CONCLUDING REMARKS

[97] At this juncture, it was also crucial to remind parties, that the services of the Family Court do not extend to babysitting for warring parties or to micromanage family dynamics, especially when parties themselves had agreed to the terms of the court order.

[98] The role of the Family Court is to make decisions that serve the best interests of the child, which include fostering a stable, nurturing environment. The Family Court aims to provide a clear, structured framework for the child's upbringing, rather than stepping in to handle day-to-day issues or resolve every minor conflict between parents.

[99] Judges assess factors like each parent's ability to provide a supportive home, the child's needs and preferences, and the parents' history of cooperation. Once the custody arrangement is set, parents are generally expected to work together in good faith to manage daily parenting decisions without constant court intervention. If ongoing issues arise, parents are encouraged to seek counselling or attend parenting courses, rather than repeatedly returning to court, which would only place undue strain on the child and hinder parental cooperation. Essentially, while courts intervene to protect the child's welfare in high-stakes situations, they are not designed to be the first line of intervention for everyday parenting disputes.

[100] In this case, it was regrettable that the petitioner-wife, despite initially agreeing to the terms set forth in the court order, chose to amplify minor issues involving the petitioner-husband in an attempt to vary the terms of the court order, which would result in displacing the children, and affecting their current environment. More so, when such terms had been carefully considered and accepted by both parties after thorough consultation with their legal representatives.

[101] In the final analysis, the petitioner-wife's dissatisfaction with certain aspects of the court order did not, in itself, constitute grounds to reopen or revise the court order. The principle here is that a court order, once agreed to and finalised, should be respected and upheld unless there was material change in circumstances that justified a revision. The legal standard for varying an agreed court order was deliberately set high to prevent parties from revisiting terms they found inconvenient or unappealing after the fact. This court was not in a position to pander to the needs of litigants to agree to terms and then decide that it is not working out to come to court to air their grievances.

[102] In conclusion, after considering the aforementioned arguments and conducting a thorough examination of all the evidence presented to this court, encompassing both written and oral arguments from both parties, this application was dismissed with costs.

Application dismissed.

Reported by Ashok Kumar